United Nations A/HRC/37/42

General Assembly

Distr.: General
21 February 2018

Original: English

Human Rights Council
Thirty-seventh session
26 February–23 March 2018
Agenda items 2 and 7
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Human rights situation in Palestine and other occupied Arab territories

Human rights situation in the Occupied Palestinian Territory, including East Jerusalem

Report of the High Commissioner for Human Rights*

Summary

The present report is submitted pursuant to Human Rights Council resolution 34/30 on the human rights situation in the Occupied Palestinian Territory, including East Jerusalem. It focuses on the practice of arbitrary detention by Israeli and Palestinian authorities. It covers the period from 1 November 2016 to 31 October 2017.

* The present report was submitted after the deadline in order to reflect recent developments.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 34/30, in which the Council requested the United Nations High Commissioner for Human Rights to report on the implementation of that resolution, with a particular focus on the factors perpetuating the arbitrary detention of Palestinian prisoners and detainees in Israeli jails, in consultation with the Working Group on Arbitrary Detention. The High Commissioner also examines the practice of arbitrary detention by the Palestinian authorities in the West Bank and Gaza. The report is aimed at providing an accurate picture of the various forms of arbitrary deprivation of liberty to which Palestinians are exposed in the Occupied Palestinian Territory. In his recommendations, the High Commissioner encourages all duty bearers to comply with related obligations under international law.

2. The report covers the period from 1 November 2016 to 31 October 2017. It is mainly based on cases monitored by the Office of the United Nations High Commissioner for Human Rights (OHCHR), as well as on information obtained by other United Nations entities operating in the Occupied Palestinian Territory and by Israeli and Palestinian non-governmental organizations (NGOs). As per Human Rights Council resolution 34/30, the report was prepared in consultation with the Working Group on Arbitrary Detention.

3. While the present report focuses on arbitrary detention, other reports of the Secretary-General and of the High Commissioner provide a more comprehensive analysis of the human rights situation in the Occupied Palestinian Territory, including as regards conditions of detention.[1]

II. Legal background

4. International humanitarian law and international human rights law apply in the Occupied Palestinian Territory, namely in Gaza and the West Bank, including East Jerusalem. The Occupied Palestinian Territory is a territory under belligerent occupation, to which the provisions governing occupation notably apply.[2] The jurisdiction and effective control exercised by Israel as the occupying Power are the basis for its human rights obligations within the Occupied Palestinian Territory. Those obligations are in line with the obligation of Israel, under the law of occupation, to protect the Palestinian population of the Occupied Palestinian Territory. Concurrently, the State of Palestine is bound by its human rights obligations regarding the entirety of the Occupied Palestinian Territory. The authorities in Gaza also bear human rights obligations given their exercise of government-like functions and territorial control.[3]

5. Arbitrary detention is prohibited by international human rights law and humanitarian law. Article 9 of the International Covenant on Civil and Political Rights guarantees the right to liberty and security of person and provides that no one shall be subjected to arbitrary arrest or detention.[4] Considered as arbitrary are deprivations of liberty that are contrary to international law provisions, mostly those relating to the right to a fair trial or other procedural guarantees,[5] as also provided by the law of occupation.[6] Unlawful confinement and wilfully depriving a protected person of the rights to a fair and regular trial

[1] See A/HRC/34/38, A/HRC/37/38 and A/HRC/37/43.

[2] As provided by the 1907 Hague Regulations, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and customary international law; see A/HRC/34/38, para. 10.

[3] See A/HRC/34/38, paras. 3–11, for more details on the applicable legal framework.

[4] See also Universal Declaration of Human Rights, art. 9.

[5] International Covenant on Civil and Political Rights, arts. 9 and 14; see also Human Rights Committee general comment No. 35 (2014) on liberty and security of person; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/43/173).

[6] Fourth Geneva Convention, arts. 66–75.

amount to grave breaches of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), hence to war crimes.[7] In addition, protected persons shall only be detained only in the Occupied Palestinian Territory and the non-respect of this rule violates the prohibition of forcible transfer; another grave breach of the Fourth Geneva Convention and a war crime. [8]

III. Arbitrary detention in the Occupied Palestinian Territory

A. Introduction

6. The Working Group has identified five legal categories relating to arbitrary detention: (a) when there is no legal basis for the deprivation of liberty (category 1), (b) when the deprivation of liberty results from the exercise of fundamental freedoms, (c) when the violations of norms relating to the right to a fair trial are of such gravity as to give the deprivation of liberty an arbitrary character, (d) when migrants are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy, and (e) when the deprivation of liberty reflects discrimination, notably based on birth, national, ethnic or social origin, language, religion and political or other opinion.[9]

7. Based on those categories, and in view of the cases monitored by OHCHR during the reporting period, the present report is divided into two parts describing two sets of factors perpetuating arbitrary detention in the Occupied Palestinian Territory. In the first part, the High Commissioner examines cases of detention without apparent or legitimate grounds, or where the right to a fair trial is not guaranteed (categories 1 and 3). In the second part, the High Commissioner examines cases where individuals have been detained for exercising their fundamental freedoms (category 2).

8. Although of particular relevance to the present context, arbitrary detention on discriminatory grounds (category 5) is not addressed separately in this report, as it is likely to apply to most cases described therein. The Working Group has notably invoked detention on discriminatory grounds in its conclusions pertaining to several cases of detention of Palestinians by Israel.[10] The Secretary-General has also noted how the application of two different legal systems in the same territory, on the sole basis of nationality or origin, is inherently discriminatory and undermines the right to a fair trial.[11]

B. Detention without grounds or fair trial guarantees

9. This section focuses on cases of detention that are likely to be arbitrary due to the absence of any legal basis justifying the detention, or where there are no prospects for a fair trial. Given the frequent invocation of vague security grounds and the use of secret evidence in the Occupied Palestinian Territory, it is often impossible to determine whether the detention is based on a legitimate ground. The practice of administrative detention is also addressed in this section.

1. Detention without legitimate grounds or legal basis

10. To be in conformity with international human rights law, any deprivation of liberty must have a legal basis. Where no reasonable ground is invoked, the detention is considered as arbitrary. Arbitrary detention is practised by Israel, the State of Palestine and the authorities in Gaza.

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[7] Ibid., art. 147, Rome Statute of the International Criminal Court, art. 8 (2) (a) (vi).

[8] Fourth Geneva Convention, arts. 49 (1), 76 and 147, Rome Statute, art. 8 (2) (a) (vii).

[9] Methods of work of the Working Group on Arbitrary Detention (A/HRC/36/38).

[10] See opinions No. 31/2017, No. 15/2016 and No. 13/2016.

[11] See A/HRC/34/38, para. 40.

11. During the reporting period, OHCHR monitored cases where residents of Gaza appear to have been arrested and detained by the Israeli authorities without legal basis. The arrest of fishermen off the coast of Gaza remains of particular concern.[12] During the reporting period, 42 fishermen, including 3 children, were reportedly arrested by the Israeli navy (apparently within the Israeli-authorized fishing zone). The circumstances of the arrests, the focus of the interrogations and the fact that most of the fishermen were eventually released without charge strongly suggest that such arrests have no legal basis and are used to collect information about Palestinian groups in Gaza, as exemplified in the cases described below.

12. On 4 December 2016, the Israeli navy arrested two fishermen at sea, reportedly posing no threat to the Israeli navy at the time. One of the men remained in Israeli detention without being officially charged for more than two weeks, while his brother was immediately released. The former was reportedly accused of affiliation to an armed group and subjected to ill-treatment during his interrogation. He had access to legal counsel only 10 days after his arrest. The court ordered his release on 22 December 2016, without any charge. Once back in Gaza, he was summoned by the internal security agency, detained for three days and interrogated regarding his arrest and detention by the Israeli authorities.

13. OHCHR monitored the arrest of nine other fishermen between 21 February and 18 September 2017. All nine were arrested at sea by members of the Israeli navy, who opened fire on them and forced them to undress and jump into the water after intercepting their boats, which were eventually confiscated. Two fishermen sustained injuries during their arrest.[13] The fishermen were all taken to Ashdod before being transferred to Beit Hanoun/Erez crossing point, where the majority reported being interrogated, notably about Hamas and other groups, including armed groups. None was indicted and all were released on the same day. They all reported that, upon return to Gaza, they were detained and interrogated by the internal security agency for periods varying from a few hours to two days.

14. Most fishermen summoned and detained by the internal security agency following arrest by the Israeli navy reported having been ill-treated. OHCHR monitored another case of possible arbitrary detention for interrogation by the internal security agency during the reporting period, based on political affiliation (see para. 59 below).

15. In the West Bank, detention without legal basis has been reported in cases where Palestinian security forces refused — in violation of the Basic Law for the Palestinian Interim Self-Government Authority — to implement court orders to release detainees.[14] Such orders are often bypassed by rearresting a person on new charges, usually invoking gubernatorial powers under Jordanian law (see para. 25 below). This practice continues to be of concern, as confirmed by the Independent Commission for Human Rights, which reported having received 75 complaints relating to cases of continued detention by the Palestinian authorities despite the issuance of release orders during the reporting period.[15]

16. A troubling case of continued detention notwithstanding release orders is the detention, since 25 May 2017, of Shadi Nammoura, from Hebron. He was first detained by the General Intelligence Service in Hebron and then later in Jericho, on the order of the Governor of Nablus. The court ordered his release three times (on 30 May, 13 June and 3 August 2017) and each time, his continued detention — in conditions that gave cause for concern — was requested by the Governor, on the third occasion based on the need to protect the detainee from the Israeli Security Forces. Mr. Nammoura was released on 7 December 2017 and arrested by the Israeli Security Forces 11 days later. The practice of detaining individuals for their own protection, against their will, remains a concern,[16] as also shown by the case of Abuhlayyel Ammar Tawfiq, who was eventually released on 6 February 2017. He had been detained by the Preventive Security Services in Ramallah

[12] See A/HRC/34/36, para. 19; and A/71/364, para. 37.

[13] See A/HRC/37/38.

[14] See A/HRC/19/20, para. 42.

[15] Independent Commission for Human Rights, monthly reports. Available from http://ichr.ps/en/1/5.

[16] See A/HRC/31/40, para. 59; and A/HRC/28/80, para. 47.

since 6 November 2015 to protect him from the Israeli Security Forces after a friend of his reportedly committed an attack against Israelis in the West Bank. Mr. Tawfiq requested to be released on his own responsibility and, along with relatives, signed a waiver in July 2016. He was held against his will for a total of 15 months. Two months after being released by the Preventive Security Service, Mr. Tawfiq was arrested by the Israeli Security Forces.

2. Unlawful administrative detention practices

17. Administrative detention refers to the deprivation of liberty outside the context of criminal proceedings. It is usually based on an order issued by State executive authorities, generally without charges, indictment or trial before a criminal court. While not prohibited as such under international law, administrative detention is permitted only in exceptional circumstances and subject to stringent safeguards to prevent arbitrariness.[17] The Human Rights Committee considers that administrative detention presents severe risks of arbitrary deprivation of liberty.[18] Indeed, the practice may undermine most fundamental fair trial guarantees. Moreover, the uncertainty that such measures imply for the detainee in the absence of any charges, known evidence or trial, as well as of any foreseeable detention period, may amount to ill-treatment. Acknowledging the exceptional character of such measures, the law of occupation provides that a civilian may only be detained for imperative reasons of security.[19] The practice of administrative detention by both the Israeli and the Palestinian authorities is a major factor perpetuating arbitrary detention in the Occupied Palestinian Territory.[20]

Use of administrative detention by Israel

18. Concerns have repeatedly been voiced about the Israeli policy of administrative detention.[21] In 1998, the Human Rights Committee called on Israel to ensure that administrative detention be brought within the strict requirements of the International Covenant on Civil and Political Rights.[22] With no improvement evident by 2010, it called on Israel to refrain from using administrative detention, particularly for children.[23] In 2014, the Committee called on Israel to end the practice of administrative detention.[24] The Committee against Torture has also repeatedly concluded that the use by Israel of administrative detention, particularly for inordinately lengthy periods, violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[25] and called upon Israel to urgently end this practice.[26]

19. On 31 October 2017, Israel was reportedly holding 453 Palestinians in administrative detention, including at least 18 individuals detained on the basis of orders that were extended by 18 to 24 months.[27]

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[17] International Covenant on Civil and Political Rights, art. 9; and Fourth Geneva Convention, art. 78.

[18] Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 15.

[19] Fourth Geneva Convention, art. 78; see also the International Committee of the Red Cross commentary thereto, p. 367.

[20] Provisions of article 14 of the International Covenant on Civil and Political Rights on the right to a fair trial are applicable where sanctions, because of their purpose, character or severity, must be regarded as penal, even if, under national law, the detention is qualified as administrative (opinion No. 31/2017, para. 30).

[21] See A/HRC/34/38, paras. 53 and 56; A/HRC/34/36, paras. 22–24; A/71/355, para. 20; A/71/364, paras. 34–35; A/HRC/31/40, paras. 37–43; A/HRC/31/43, paras. 42–43; A/69/347, paras. 28–29; A/HRC/28/45, paras. 49–50; and A/HRC/28/80, paras. 32–33. See also the position of Israel on its practice of administrative detention. Available from www.law.idf.il/602-5089-en/Patzar.aspx.

[22] See CCPR/C/79/Add.93, para. 21.

[23] See CCPR/C/ISR/CO/3, para. 7 (b).

[24] See CCPR/C/ISR/CO/4, para. 10 (b).

[25] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16.

[26] See CAT/C/ISR/CO/4, para. 17; and CAT/C/ISR/CO/5, paras. 22–23.

[27] See www.hamoked.org/Prisoners.aspx; see also www.btselem.org/administrative_detention/statistics; and joint reporting by Palestinian Prisoners Commission, Addameer Prisoners Support and Human Rights Association, Al Mezan Center for Human Rights and Palestinian Prisoners Club.

20. The main legal basis for administrative detention by Israel in the Occupied Palestinian Territory is Military Order 1651,[28] which empowers military commanders to detain a person for a period of time not exceeding six months, if they have reasonable grounds to believe that detention is required for reasons related to regional or public security.[29] Detention orders may be extended for additional periods of up to six months, with no legal limit on the number of renewals, hence allowing for the indefinite detention of a person.[30] The legal basis for administrative detention can be found in two other Israeli laws: the Emergency Powers (Detention) Law of 1979[31] and the Incarceration of Unlawful Combatants Law of 2002.[32] While the former is the only one pertaining to East Jerusalem, the latter is generally used to detain Palestinians from Gaza. Both laws grant broad discretionary power to issue detention orders that can be indefinitely renewed.

21. These laws do not conform with international human rights law. Detention should not last longer than absolutely necessary and the overall length of possible detention should be limited.[33] International human rights law also provides that grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[34] The vague and undefined reasons provided by Israeli laws to justify administrative detention effectively allow the Israeli authorities to use administrative detention as an alternative to criminal proceedings, mainly when there is not sufficient evidence to charge an individual, or when the authorities do not reveal the available evidence.[35]

22. Administrative detention is also used to keep individuals incarcerated following the completion of their sentence, as exemplified by the case of Bilal Kayed. Convicted in March 2003, he was completing a prison sentence of 14 and a half years when a 6-month administrative detention order was issued against him, 6 days before his expected release on 7 June 2016, on the ground that his membership of the Popular Front for the Liberation of Palestine would endanger security. He was eventually released on 13 December 2016, after a 71-day hunger strike.[36] As described in previous reports, numerous detainees have resorted to hunger strikes to protest against and raise attention regarding their indeterminate detention without formal charges.[37]

23. Although Israeli legislation provides for judicial review and guarantees the right to legal counsel, the opportunity to challenge detention is usually undermined by the fact that, in the vast majority of cases, evidence remains classified on grounds of State security.[38] Hence, neither the detainee nor the lawyer is informed of the allegations and detention grounds, undermining any effective right to challenge the detention. Human rights law prescribes that the detainee should at least have access to the essence of the evidence on which decisions are taken.[39] The High Commissioner remains deeply concerned by the policy of administrative detention by Israel on vague or undisclosed security grounds, in lengthy processes where individuals are deprived of core due process guarantees. In

[28] See Military Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651). Available from http://nolegalfrontiers.org/en/military-orders/mil01/67-security-provisions-chapter9-271-315 (English translation).

[29] Ibid., sect. 285 (A).

[30] Ibid., sect. 285 (B).

[31] See www.btselem.org/sites/default/files/1979_emergency_powers_law_detention_0.pdf.

[32] See www.hamoked.org/files/2011/240_eng.pdf.

[33] See Human Rights Committee general comment No. 35 (2014), para. 15.

[34] Ibid., para. 22.

[35] See www.btselem.org/administrative_detention/occupied_territories.

[36] See A/HRC/34/36, para. 23.

[37] See A/HRC/34/38, para. 53; A/71/364, para. 35; and A/69/347, para. 28.

[38] See Military Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651). Available from http://nolegalfrontiers.org/en/military-orders/mil01/67-security-provisions-chapter9-271-315 (English translation), sects. 290–291; see also Emergency Powers (Detention) Law of 1979, arts. 6 and 8. Available from www.btselem.org/sites/default/files/1979_emergency_powers_law_detention_0.pdf.

[39] See Human Rights Committee general comment No. 35, para. 15.

addition, the detention of Palestinians in Israel is in violation of the prohibition of forcible transfer of protected persons outside the Occupied Palestinian Territory.[40]

Authority of Palestinian governors to order detention in the West Bank

24. The Secretary-General and the High Commissioner have previously expressed concerns about administrative detention practices by the Palestinian authorities that amount to arbitrary detention.[41] While there is no record of the total number of administrative detainees in the West Bank, the Independent Commission for Human Rights recorded 97 cases of administrative detention during the reporting period.

25. According to Palestinian law, individuals cannot be deprived of their liberty, except on the basis of an order issued by a competent judicial body, as provided by the law.[42] However, reports of arrests and detentions upon the order of a provincial governor are of continuous concern.[43] Indeed, according to the Jordanian Prevention of Crimes Act of 1954, governors have the authority to arrest and detain individuals on the very general basis of maintaining public law and order.[44] As shown by cases monitored by OHCHR, the authorities have no apparent intention to charge or prosecute those arrested on such basis and may detain them for up to six months without the detention being reviewed by a judge or any other officer authorized by law to exercise judicial power.[45]

26. The routine practice of detention on a governor's authority is inconsistent with international law[46] and raises concerns of arbitrary detention, not least as governors have apparently been using such power mainly to detain political opponents.[47]

3. Violations of due process guarantees in criminal proceedings

27. Another factor perpetuating arbitrary detention is the violation of the right to a fair trial in criminal proceedings, when it is of such gravity as to give an arbitrary character to the deprivation of liberty. Through trial monitoring, OHCHR has identified several concerns about violations of fair trial rights in the Israeli justice system concerning Palestinians, as illustrated by the case of Mohammad el Halabi.

28. As previously reported,[48] the Head of the Gaza World Vision office, Mohammad el Halabi, was arrested at Beit Hanoun/Erez crossing point on 15 June 2016 on allegations of diverting humanitarian funds to support armed groups in Gaza. On 3 July 2016, a United Nations Development Programme contractor was also arrested at Beit Hanoun/Erez crossing point on similar grounds. Mr. El Halabi was denied access to a lawyer for almost a month while the United Nations Development Programme contractor's access to a lawyer was reportedly also delayed. Indeed, Israeli law allows investigation authorities to deny an individual arrested on suspicion of committing a security offence the right to meet with a lawyer for up to 21 days.[49] This provision is applicable to any investigation of security offences, as broadly defined in the law.

29. Delayed access to a lawyer often suggests that the detainee has been held incommunicado. In addition, Israeli law allows for detainees accused of a security offence to be banned from attending hearings.[50] Hence, they may be held incommunicado for weeks

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[40] Fourth Geneva Convention, art. 49.

[41] See A/HRC/34/38, para. 54; A/HRC/34/36, paras. 55–58 and 70–74; A/HRC/31/44, para. 78; and A/HRC/31/40, paras. 56–58 and 69–70.

[42] See Amended Basic Law of 2003, art. 11; and Penal Procedures Law of 2001, art. 29.

[43] See A/HRC/34/38, para. 54; A/HRC/34/36, para. 58; and A/HRC/31/40, paras. 56–58.

[44] Prevention of Crimes Act of 1954, art. 4; Administrative Divisions Regulation No. 1 of 1966.

[45] See A/HRC/34/36, para. 58.

[46] In 2014, a petition was submitted to the Palestinian High Court, challenging the constitutionality of the Jordanian law in question, and was reportedly dismissed on procedural grounds.

[47] See A/HRC/34/36, para. 58.

[48] Ibid., para. 21.

[49] Criminal Procedure Law (Powers of Enforcement — Arrest), 1996, art. 35 (b).

[50] Decisions made in ex parte hearings can also be concealed (Counter-Terrorism Law of 2016, arts. 48–51).

without seeing a judge, lawyer or family member and at the mercy of interrogators. Not only can incommunicado detention in itself amount to torture[51] but it also increases the risk of torture and ill-treatment due to isolation.[52]

30. During his interrogation, Mr. El Halabi was allegedly exposed to ill-treatment that may amount to torture. He was also reportedly exposed to threats by undercover informers acting as inmates and inducing detainees to confess. Acquisition of evidence under pressure or duress is of concern, as it notably undermines the fairness of the trial. OHCHR further observed how some detainees from Gaza testifying as witnesses in Mr. El Halabi's trial asserted that they had at some point confessed to allegations in similar circumstances. Although Israeli law provides for the audio and video recording of interrogations of detainees suspected of serious offences, the police and security agencies have been exempted from this requirement as regards Palestinians suspected of security offences since 2002, an exemption made permanent in 2017. The exemption has removed a key safeguard against the use of torture and ill-treatment to obtain confessions. According to international human rights law, any information obtained as a result of torture or other cruel, inhuman or degrading treatment shall not be invoked as evidence in proceedings.[53]

31. Mr. El Halabi's first hearing took place on 30 August 2016. The trial initially took place behind closed doors and the case was initially subject to a gagging order that also precluded the lawyer from sharing any information. The ongoing trial is public, except for the cross-examination of certain witnesses for alleged security reasons. In addition, an important part of the evidence is being kept secret by the prosecution. The use of privileged evidence, to which not even the detainee's lawyer has access, is of great concern in trials involving Palestinians. In view of the right of defence under international law, the detaining authority should provide all relevant information to the judge and the defence, including exculpatory information.[54] Mr. El Halabi's lawyers challenged the use of secret evidence in front of the Supreme Court, which — on 12 January 2017 — ordered part of the non-disclosed evidence to be shared with the defence. However, almost one and a half years after the arrest of Mr. El Halabi, the defence lawyer has still not managed to see all of the unprivileged evidence against his client, raising serious concerns as to his right to defence and to a fair trial.[55]

32. Since the beginning of Mr. El Halabi's trial, several additional charges have been brought against him as a part of the same case, following unsuccessful offers of plea bargains by the prosecution. The deals pertain to a few years of imprisonment, on the condition that the accused gives his agreement in that regard before the court starts examining classified evidence. The pressure exercised on suspects to agree to plea bargains — that imply pleading guilty to certain charges in return for what is usually a more lenient sentence — is extremely high.[56] In view of the minimal rate of acquittals of Palestinians before Israeli courts, lawyers encourage their clients to accept such deals, in order to get a lower sentence and avoid custody during lengthy trials.[57] Defendants who have continuously pleaded not guilty eventually concede to charges through a plea bargain, as

[51] See www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

[52] A/HRC/6/17/Add.4, para. 24. See also http://stoptorture.org.il/wp-content/uploads/2015/10/When-the-Exception-Becomes-the-Rule-2010.pdf.

[53] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15; and United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, guideline 12.

[54] The disclosure of information may be restricted to protect national security but has to be necessary and proportional to the end sought. See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, guideline 13.

[55] According to the Working Group on Arbitrary Detention, the use of secret evidence might affect the right to a fair trial to such extent as to render the detention arbitrary. Communication provided by the Working Group to OHCHR, dated 5 January 2018.

[56] According to the Israeli State Attorney's 2016 report, 77 per cent of convictions were based on a plea bargain. Available from www.justice.gov.il/Units/StateAttorney/Documents/Annual-Report-2016.pdf (in Hebrew).

[57] See www.btselem.org/download/201506_presumed_guilty_eng.pdf.

was the case with Waheed al Bursh, who was released on 12 January 2017,[58] and Khalida Jarrar in 2016 (see para. 55 below).

4. Arbitrary detention of children

33. The detention of Palestinian children is of particular concern. As of 30 June 2017, 318 Palestinian children were in Israeli detention.[59] Between 1 November 2016 and 30 September 2017, the United Nations Children's Fund (UNICEF) documented 135 cases of detained children, including three under administrative detention.[60] After falling into disuse for almost four years, the Israeli practice of administrative detention of children resumed in October 2015.[61]

34. Previous reports on the arrest and detention of Palestinian children reflected concerns relating to the lack of adherence to international standards by Israel.[62] The military justice system appears particularly problematic regarding respect of procedural guarantees. Interrogations of children are conducted in the absence of parents, close relatives or a lawyer, and are not audio-visually recorded.[63] Children detained under military orders are usually not promptly informed, in a language that they understand, of the charges against them, and they may be detained for up to four days before being brought before a military judge.[64] According to UNICEF, in almost 10 per cent of the cases of detention of children monitored between 1 November 2016 and 31 September 2017, the children reported having been held in solitary confinement for periods ranging from 6 to 20 days. In over 65 per cent of the cases monitored by the NGO Defence for Children International — 66.2 per cent in the West Bank and 88.5 per cent in East Jerusalem — children were shown, or made to sign, documentation written in Hebrew, a language that they usually do not understand.

35. During the reporting period, OHCHR continued to monitor cases where it appears that Palestinian children were arrested and detained in violation of the Convention on the Rights of the Child.[65] According to the Convention, the detention of children should be used only as a measure of last resort and for the shortest appropriate period of time, and the best interest of the child should be a primary consideration.[66] The Secretary-General previously noted that the large number of Palestinian children in Israeli detention seemed incompatible with its use as a measure of last resort.[67]

36. On 19 March 2017, Sofyan, an 8-year-old boy from the Old City of Hebron, was arrested by Israeli soldiers as he was walking in the street near the settlement of Kiryat Arba to retrieve a toy he had dropped on his way to visit his grandparents. He was reportedly approached and grabbed from behind by an Israeli soldier, who then forcibly took him from house to house insisting that he identify alleged stone-throwers.[68] He was released after an hour.

37. On 7 April 2017, 17-year-old Musa Hammad was arrested at night by the Israeli Security Forces and brought to Ofer Prison, where he was interrogated about a car ramming

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[58] See A/HRC/34/36, para. 21, and www.ps.undp.org/content/papp/en/home/presscenter/pressreleases/2017/01/04/undp-statement-attributable-to-a-undp-spokesperson-on-waheed-al-bursh-case.html.

[59] Data provided to the United Nations Children's Fund (UNICEF) by the Israel Prison Service.

[60] According to statistics compiled by B'tselem, there were two children in administrative detention at the end of June 2017. Available from www.btselem.org/administrative_detention/statistics.

[61] See A/HRC/31/40, para. 41; A/71/364, para. 34.

[62] See A/HRC/34/38, paras. 56–57; A/HRC/34/36, para. 19–20 and 25–30; A/HRC/31/40, paras. 38–43; A/71/364, paras. 33–37; and A/70/351, para. 48.

[63] See CRC/C/ISR/CO/2-4, paras. 35 and 74.

[64] Ibid., paras. 73–74; and www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf.

[65] Convention on the Rights of the Child, art. 37 (b); see A/HRC/34/38, para. 58.

[66] Convention of the Rights of the Child, arts. 3 (1) and 37 (b).

[67] See A/71/86, para. 24.

[68] See Gili Cohen, "Palestinian mother says Israeli soldiers forced 8-year-old son to help nab stone throwers", *Haaretz*, 23 March 2017. Available from www.haaretz.com/israel-news/1.779173.

attack that his brother had allegedly conducted. Musa, who denied any knowledge of the attack, reported having been ill-treated during his arrest and detention. He was held for two months in administrative detention and consequently missed his high-school exams.

38. During the reporting period, the Working Group issued an opinion concerning the detention of a 12-year-old Palestinian boy from East Jerusalem, concluding that the non-observance of procedural guarantees was of such gravity as to give the deprivation of liberty an arbitrary character.[69] It is not the first time that the Working Group has qualified as arbitrary instances of Palestinian children detained by Israel.[70] Child detention by Israel might also be considered as arbitrary as it does not appear to be used as a measure of last resort, as required by the Convention on the Rights of the Child.

39. Between 1 January and 31 October 2017, the Palestinian authorities in the West Bank reportedly arrested and detained 335 children.[71] This high figure raises concerns as to whether child detention is being used as a measure of last resort in the West Bank.

C. Detention for exercise of guaranteed fundamental freedoms

40. The second legal category identified by the Working Group appears to be particularly relevant in the present context. All duty bearers have indeed continued to resort to arbitrary detention during the reporting period, mainly in order to curtail political dissent or the expression thereof and to impede the work of journalists and human rights defenders. Fundamental freedoms, such as the freedoms of expression, peaceful assembly and association, may be restricted, but only as provided by the law and necessary for the protection of the rights and freedoms of others, as well as for the protection of national security, public safety, order, health or morals.[72]

1. Freedom of expression on social media

41. During the reporting period, numerous Palestinians were arrested and charged by the Israeli authorities for incitement on Facebook.[73] Situations underlying these charges range from the posting of a picture of a Palestinian killed by the Israeli Security Forces during clashes, to the use of language that could be classified as hate speech. Based on files examined by OHCHR, it is questionable in a number of cases whether the effective incitement potential and the suspect's criminal intent are sufficiently evident to justify criminal liability. It is not unusual that — shortly before the completion of a sentence for incitement, often based on a plea bargain — a military order is issued to prolong the detention based on security arguments. While some cases may seem justified, it appears that there is a real risk for Palestinians of arrest on grounds of alleged incitement while legitimately exercising their right to freedom of expression on social media.

42. On 24 June 2017, the so-called Palestinian cybercrime law was adopted by Presidential Decree No. 16 of 2017. While it might be a necessary step to regulate the commission of crimes via the Internet, the law raises strong concerns about its potential to curtail free speech. It notably criminalizes the publication of data — and the creation of websites intended to publish such data — that violates public morality and public order, endangers community safety, or insults holy sites, religions and beliefs and family values. Those overly broad terms have the potential to be interpreted to excessively undermine freedom of expression. The law was adopted within a general context of restrictions on

[69] See opinion No. 3/2017, para. 41.

[70] See opinions No. 13/2016 and No. 24/2016.

[71] Data provided to OHCHR by the Palestinian police.

[72] International Covenant on Civil and Political Rights, arts. 19, 21 and 22; see also Human Rights Committee general comment No. 34, paras. 21–36.

[73] According to the Palestinian Prisoners Commission, Addameer Prisoners Support and Human Rights Association, Al Mezan Center for Human Rights and Palestinian Prisoners Club, 470 indictments based on Facebook posts were issued from 1 October 2015 to 31 October 2017 (including 220 in 2017).

freedom of expression[74] and civil society was not consulted regarding its drafting.[75] This law served as the basis for the arrest and detention of journalists and human rights defenders (see paras. 51–52 below). During the reporting period, 77 cases of arrests in violation of guaranteed freedoms were referred to the Independent Commission for Human Rights.

43. In Gaza, OHCHR monitored cases of individuals arrested and detained for posting opinions on social media that could be considered to be critical of the Gaza authorities. In all these cases, the individuals were released without charge after a few days or weeks, upon signing commitments to, notably, uphold the law and refrain from public criticism. Most of these cases monitored by OHCHR included allegations of ill-treatment during interrogation.

44. On 30 May 2017, a teacher was arrested by the internal security agency for a post on social media expressing disapproval of an official for stating that Gaza was a prosperous place. He was released after four days. On 4 July 2017, another Palestinian man from Gaza — well known for his critical stance against the authorities in Gaza — was arrested by the internal security agency on accusations of incitement after having called on social media for a protest against the electricity crisis. He was released after 12 days. OHCHR also monitored the case of an individual detained for having allegedly participated in the popular protests against the electricity crisis in January 2017. In another case, on 19 April 2017, Mahmoud Sulieman Mohammad al Ziq, the Secretary-General of the National Work Committee in Gaza, known for his critical position against the authorities in Gaza, was assaulted and kidnapped by unidentified men. He was advised to refrain from talking about politics, including in relation to the electricity crisis, before being released on the same day.

45. On 27 April 2017, a social media activist and member of the Popular Front for the Liberation of Palestine was arrested by the internal security agency, reportedly for having posted an excerpt from a novel by a Palestinian writer about the plight of Palestinian refugees. He was detained for two days. His access to a lawyer and contact with his family were delayed and he was reportedly subjected to ill-treatment.

2. Journalists and human rights defenders

46. All duty bearers have been resorting to the arrest and detention of journalists and human rights defenders. These cases may amount to arbitrary detention as the practice was most likely motivated by the exercise of the individuals' rights to freedom of expression and assembly.

47. Omar Nazzal, a Palestinian journalist and member of the Palestinian Journalists Syndicate, was arrested by the Israeli Security Forces on 23 April 2016, as he was about to cross the Al-Karameh/Allenby/King Hussein Bridge to represent the Syndicate at a meeting in Sarajevo.[76] The initial administrative detention order was for four months and was extended three times, up to a total of 10 months. Mr. Nazzal was eventually released on 20 February 2017. His detention was based on his alleged affiliation to the Popular Front for the Liberation of Palestine as a threat to the security of Israel. However, he was not only interrogated about his political affiliation, but also about his work as a journalist and his membership of the Syndicate. In a decision issued on 24 May 2016, the military judge approved the administrative detention, based on the fact that the detainee could not be tried under criminal procedure because of the confidential nature of the evidence. This may suggest that administrative detention is used as an alternative to criminal proceedings, in contradiction of international law.[77]

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[74] Twenty-seven websites — mainly linked to Hamas or opposition leader Mohammad Dahlan — were closed by the Attorney General in June 2017 and remain offline at the time of writing (see A/HRC/37/38).

[75] Following strong criticism by civil society, the Palestinian Authority agreed to revise the law. This process was ongoing at the time of writing.

[76] See opinion No. 31/2017.

[77] Fourth Geneva Convention, art. 68, and 1958 ICRC Commentary thereto.

48. Hasan Safadi, a Palestinian journalist and media coordinator with the NGO Addameer Prisoners Support and Human Rights Association, remained in administrative detention during the reporting period. His arrest by the Israeli Security Forces, on 1 May 2016, at the Al-Karameh/Allenby/King Hussein Bridge border crossing on his way back from an Arab youth conference in Tunisia, was related to his visit to Lebanon 15 months earlier. As he was set to be released on bail on 10 June 2016, a six-month administrative detention order was issued against him, which was renewed twice during the reporting period even though he had been sentenced to three months' imprisonment on 27 October 2016. Mr. Safadi was finally released on 7 December, having spent more than a year and a half in administrative detention.[78]

49. Another Palestinian human rights defender who remained in Israeli administrative detention during the reporting period is Hassan Karajah, youth coordinator for the Stop the Wall movement. Released in 2014 after serving a 22-month sentence for having visited Lebanon, he was rearrested on 12 July 2016 for alleged affiliation to the Popular Front for the Liberation of Palestine and to Al-Hirak al-Shababi, a Palestinian youth movement outlawed by Israel on 11 July 2016 for alleged involvement in terrorist activities against Israel. Mr. Karajah was released on 9 November 2017. Under the cover of legality, it appears that administrative detention is used by Israel to detain Palestinians in order to sanction the exercise of guaranteed freedoms, on the ground that it might prejudice the security of Israel.

50. As stated by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 and the Special Rapporteur on the situation of human rights defenders on 7 July 2017,[79] the situation of Issa Amro, a Palestinian human rights defender who runs the Youth Against Settlements organization in Hebron, remains of concern. A well-known advocate for non-violence, Mr. Amro has been subjected to regular harassment and arrests by the Israeli Security Forces, most recently on 29 February 2016.[80] His first hearing at Ofer Military Court took place on 23 November 2016. His indictment includes 18 charges, some of them going back to 2010. Mainly repetitive, the charges include alleged obstruction, insult and assault of soldiers, incitement and participation in assemblies without a permit. The reported facts behind the charges appear ludicrous within the context of peaceful demonstrations and the heavy military presence in Hebron. On 19 February 2017, the court dismissed the defence's claim that prosecuting Mr. Amro on such old charges constituted an abuse of justice designed to halt his activity as a human rights defender. Trial monitoring by OHCHR reveals that the Israeli Security Forces and the military prosecutors do not distinguish between violent and non-violent protest, incitement and the legitimate exercise of freedom of expression and that free speech and peaceful demonstrations are considered as acts disturbing the peace or harming public order.[81]

51. On 4 September 2017, while on trial before the Israeli military court — a process which was ongoing at the time of writing — Mr. Amro was arrested under the newly promulgated cybercrime law by the Preventive Security Service. His arrest resulted from his calling into question, on social media, the arrest of the director of Al-Hurriya radio station, Ayman Al-Qawmeh, by the Palestinian Authority. Mr. Amro believes that his arrest might be linked to his exposure of a number of Palestinian officials concerning corruption issues, as well as to his candidacy for the latest Palestinian municipal elections. He was released on bail on 10 September 2017 and — at the time of writing — was awaiting a final court decision. Mr. Amro's case is emblematic insofar as it illustrates the risks that human rights defenders face regarding arrest and prosecution by both the Israeli and the Palestinian authorities.

52. On 9 August 2017, six journalists were arrested by the General Intelligence Service under the cybercrime law in Hebron, Bethlehem and Nablus. They were released six days

[78] Hassan Safadi was released on 7 December 2017.

[79] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21855&LangID=E.

[80] See A/71/355, para. 33; and A/HRC/34/36, para. 47.

[81] Military orders limit freedoms of expression and assembly (Military Order 1651, sect. 251 (b), and Order No. 101 Regarding the Prohibition of Acts of Incitement and Hostile Propaganda).

later, as a result of pressure brought to bear by the Palestinian Journalists Syndicate. They were reportedly interrogated about the publication of information that fell under the broad scope of the cybercrime law and that could affect the security of the Palestinian Authority. However, no indictment was issued against them. Interviewed by OHCHR, the journalists believe their arrest was linked to the political divide between the West Bank and Gaza and to the arrest of a journalist in Gaza as described in the next paragraph.[52]

53. A Palestinian television reporter was arrested by the internal security agency in Gaza on 16 June, on allegations of collaboration with the Palestinian Authority. His detention for almost two months, as extended by the military prosecuting authority, was not based on any judicial order. He was denied access to a legal representative within the detention facility and first met his lawyer in court one month after his arrest. He was eventually released on $200 bail on 13 August 2017. There were also concerns that he had been subjected to ill-treatment during his detention.

54. After the Gaza authorities announced, on 24 April 2017, that they would take measures against individuals and institutions circulating rumours, a journalist from Gaza City was arrested on 25 April and detained until the next day for allegedly circulating fake information and rumours in the Palestinian media. He was released after undertaking in writing not to undermine law and order by spreading rumours. He also published a corrigendum and apologized to his readers.

3. Political affiliation

55. Palestinian civil society leaders Khalida Jarrar and Khitam Saafin were arrested by the Israeli Security Forces on 2 July 2017, during night raids on their homes, for their alleged membership of the Popular Front for the Liberation of Palestine, a claim that both women deny. Ms. Saafin is the president of the union of Palestinian women's committees, an organization that works for the community-based economic and social development of women in the West Bank and Gaza. Ms. Jarrar is a member of the Palestinian Legislative Council and an outspoken critic of the Israeli occupation. She is also a member of the board of directors of the Addameer Prisoners Support and Human Rights Association and of a national Palestinian committee for the follow-up with the International Criminal Court. Neither the detainees, nor their lawyers, have had access to the material against them, which is being held secret by the court. Ms. Saafin was released on 2 October 2017, after completing a three-month administrative detention order. Ms. Jarrar's six-month detention order expires on 1 January 2018.[53]

56. On 9 March 2017, Samira Halayqa, another Palestinian Legislative Council member, was arrested by the Israeli Security Forces during a night raid. Transferred to Ofer Prison, she was reportedly interrogated regarding her alleged affiliation to Hamas during the 2006 election and her political opinions as expressed on social media. She was charged with incitement and participation in activities organized by Hamas. She rejected those charges, which, according to her, were related to her involvement in legitimate activities, such as participation in peaceful gatherings calling for the respect of Palestinians' rights. The court ordered her release twice for lack of evidence. It was only after a third order that she was eventually released on bail on 9 May 2017. At the time of writing, hearings relating to Ms. Halayqa's case were ongoing. There are concerns that she was ill-treated during her arrest and detention and denied proper medication.

57. In the West Bank, there are concerns about the Palestinian authorities arresting individuals who oppose their policies. On 31 August 2017, Wahid Abu Mariya, known for his opposition to the Palestinian Authority, was arrested by the joint Palestinian security forces — on the orders of the Preventive Security Services — at his home in the Hebron

[52] See A/HRC/37/38, para. 60, for summary of another case of possible arbitrary detention of a journalist.

[53] Ms. Jarrar was detained for 14 months between 2015 and 2016, as she was facing trial for alleged membership of the Popular Front for the Liberation of Palestine. The decision of the military court to release her on bail was reversed following an appeal by the prosecution. She was released in June 2016 after accepting a plea bargain; see also Working Group opinion No. 15/2016.

Governorate. He was detained by the General Intelligence Service, military intelligence and the Preventive Security Services in Jericho, until his release on 21 September 2017, four days after the court ordered his release, without indictment. His arrest and incommunicado detention for four days raise concerns as to ill-treatment, including torture during interrogation.

58. In Hebron, several people were arrested while participating in peaceful demonstrations, mainly for alleged affiliation to the group Hizb ut-Tahrir, an Islamist organization critical of the Palestinian Authority. On 11 February 2017, the Preventive Security Services arrested approximately 50 persons in the context of a demonstration. While forcibly dispersing the crowd, they reportedly assaulted and arrested dozens of participants and passers-by, who were all released within 24 hours. The same day, leading figures of Hizb ut-Tahrir were also arrested at checkpoints while entering the city. They were held by the General Intelligence Service in Hebron and later transferred to Jericho, where they were detained for between 7 and 15 days without being indicted. A similar operation involving the arrest of individuals allegedly affiliated to Hizb ut-Tahrir took place on 24 February 2017, with two individuals reportedly being detained by the General Intelligence Service for over a month.

59. In Gaza, the internal security agency has also been detaining individuals on the basis of their political affiliation. On 13 April 2017, a woman was arrested by the internal security agency and detained for 10 days, during which period she was reportedly interrogated on her political affiliation to Fatah. She was released without being officially charged. The arrest and detention of members of Salafist groups, whose strict version of political Islam is perceived as a threat by the Hamas regime, continued during the reporting period.[84] In December 2016, the security forces in Gaza launched a campaign and arrested dozens of members of Salafist groups. Other members were arrested during a second campaign launched after a suicide bomb attack on 17 August 2017. Many of them, including children, are currently being held by the internal security agency and some have, to date, not been charged.

60. OHCHR documented the following two cases of arrest based on allegations of affiliation with Salafist groups. On 19 December 2016, a man from Rafah was arrested during a joint operation of the internal security agency and the Izz al-Din al-Qassam Brigades. He appeared before the military court on 12 February 2017, where the prosecutor was not in a position to provide any evidence against him. He was eventually released on 26 April 2017 without being officially charged. He reported having been subjected to ill-treatment during his interrogation. Another man from Gaza City was reportedly arrested on 11 December 2016 by masked men belonging to the internal security agency. Although the military court ordered his release on bail on 20 February 2017, the internal security agency refused to implement the order until 12 April 2017, following the intervention of the Director of the Security Forces. At the time of writing, five hearings had taken place and a decision was pending.

IV. Conclusion and recommendations

61. **The present report outlines the high risk that Palestinians face of being arbitrarily deprived of their liberty, both by the Israeli Security Forces and the Preventive Security Services. This is especially the case for Palestinians openly opposing the Israeli occupation, or the policies of their government in the West Bank or in Gaza. Journalists and human rights defenders have been particularly targeted within this context. Cases monitored by OHCHR show how Palestinians risk being arrested for having participated in peaceful protests, questioned acts of their own government — including on social media — or for alleged political affiliation.**

62. **While Israeli legislation allows for indefinite administrative detention, Palestinian safeguards against the arbitrary deprivation of liberty are bypassed**

[84] See A/HRC/28/80, para. 53.

through the use of executive powers. Administrative detention is used by both the Israeli and the Palestinian authorities to circumvent the national criminal justice system in order to detain individuals for vague or undisclosed security reasons, against whom evidence is insufficient, or who are due to be released. Cases monitored by OHCHR reveal how all duty bearers blatantly disregard the principle of fair trial and due process guarantees, particularly when an individual is deemed to endanger national security, public order or political cohesion, or has information of interest to the authorities.

63. Palestinians, including children, are subjected to arbitrary arrest and detention. Detainees' lack of knowledge of the grounds for detention and its length further violates rights inherent to human dignity, in addition to the obligations of Israel — as the occupying Power — to treat the Palestinian population humanely at all times. It is of serious concern that, in most cases, detention appears to be motivated by discriminatory grounds, including religion, national origin, birth or other status and political or other opinion.

64. Human rights law prescribes that anyone who has been the victim of unlawful arrest or detention should have an enforceable right to compensation.[35] However, there is no realistic way for Palestinian victims of arbitrary detention to seek redress, as their detention is usually covered by the seal of legality of a court ruling or a decision of the executive.

Recommendations to all duty bearers

65. All violations and abuses of the human rights of Palestinians must immediately cease and be promptly, impartially and independently investigated; those responsible must be held accountable and the victims provided with effective redress. All duty bearers and parties must respect international law and comply with their obligations and responsibilities under international human rights law and international humanitarian law.

66. All duty bearers must end their practices amounting to arbitrary detention, in particular they should:

(a) End the practice of administrative detention and ensure that all administrative detainees are promptly charged or released;

(b) Ensure that the rights of detainees are respected, including all rights inherent to a fair trial, including the right to defence and not to be tortured or ill-treated;

(c) Ensure that all children are treated with due consideration for their age and detained only as a last resort and, if so, for the shortest possible time, and for the purpose of rehabilitation;

(d) Respect, protect and fulfil the rights to freedom of expression, opinion and peaceful assembly and remove all unlawful restrictions to these rights from statutory law;

(e) Ensure that the rights of journalists and human rights defenders in the Occupied Palestinian Territory are respected and protected and that they can conduct their activities without harassment or being subjected to legal proceedings in violation of international human rights law;

(f) Ensure that victims of arbitrary detention are provided with appropriate compensation.

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[35] International Covenant on Civil and Political Rights, art. 9 (5).